APPEAL NO. 043031
FILED JANUARY 20, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on October 19, 2004. The hearing officer determined that (Dr. B) was the validly appointed designated doctor, and that the appellant's (claimant) date of maximum medical improvement (MMI) is January 5, 2004, with a 0% impairment rating (IR).

The claimant appealed, contending that Dr. B's examination was not scheduled during the required time period and that the Texas Workers' Compensation Commission (Commission) properly appointed (Dr. K) as the designated doctor; that Dr. K performed his examination during the proper time period; and that the claimant's date of MMI is December 30, 2003, with a 5% IR. The respondent (carrier) responds, urging affirmance.

DECISION

Reversed and a new decision rendered.

The background facts are not in dispute. The parties stipulated that the claimant sustained a compensable low back injury on _____. By order dated December 8, 2003, Dr. B was appointed as a designated doctor to assess MMI and IR with an examination date of January 5, 2004. The claimant attended the examination and Dr. B certified an MMI date of January 5, 2004, with a 0% IR based on Table 72 Diagnosis-Related Estimate (DRE) Lumbosacral Category I, of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000).

Inexplicably, by order dated December 9, 2003, Dr. K was appointed as a designated doctor to assess MMI and IR with an examination date of December 30, 2003. The claimant also attended that examination and Dr. K certified MMI on December 30, 2003, with a 5% IR based on Table 72, DRE Lumbosacral Category II: Minor Impairment.

Dispute Resolution Information System (DRIS) notes reflect both the appointment of Dr. B (with two separate appointment times on January 5, 2004, with a subsequent note canceling the earlier time) and Dr. K. A DRIS note dated December 16, 2003, confirms the "correct DD appt is set for 1/05/03 [*sic* 04] @ 10:15." Subsequently, in a DRIS note dated January 26, 2004, the claimant informed the Commission of the multiple appointments. The Commission informed the claimant that Dr. B's report "carries presumptive weight" and that the "2nd app't w/ [Dr. K] does not carry weight. TWCC set in error." The claimant contends that the second appointment with Dr. K was valid and the first appointment with Dr. B was invalid because the

appointment was outside the 14 to 21 day window established by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(d) (Rule 130.5(d)).

Section 408.0041(b) provides in part that the Commission shall assign a designated doctor not later than the 10th day after a request is received "and the examination must be conducted not later than the 21st day after the date on which the commission issues the order . . . ." Rule 130.5(d) has provisions for selection and scheduling of an examination by a designated doctor and Rule 130.5(d)(1) provides that within 10 days of receipt of a valid request the Commission "shall issue a written order assigning a designated doctor; set up a designated doctor appointment for a date no earlier than 14 days, but no later than 21 days from the date of the commission order." Neither the 1989 Act, the Commission rules or preamble indicate what the consequences are for failing to adhere to the time frames established in Section 408.0041 and Rule 130.5(d)(1).

The hearing officer cites Texas Workers' Compensation Commission Appeal No. 033014, decided December 23, 2003, as interpreting Rule 130.5(d)(1). That case involved only one designated doctor and an appointment that was set 13 days after the order appointing the designated doctor. The claimant failed to attend the examination and the carrier suspended temporary income benefits (TIBs) in accordance with Rule 130.6(c). The issue was one of determining the effect of the Commission's failure to follow the rule in setting the appointment and whether the fact that the appointment was prior to the 14 days provided for in Rule 130.5(d)(1) was good cause for failing to attend the examination. In reversing the hearing officer the Appeals Panel remarked that the orderly administration of the designated doctor process requires compliance with Commission orders and where there is a technical defect in the order, the order must nevertheless be followed. As the claimant points out, Appeal No. 033014, *supra*, can be distinguished in a number of ways; this case does not involve the suspension of TIBs, the claimant in this case attended both examinations, Appeal No. 033014, involved only one designated doctor, and this case centers on the validity of two Commission orders. The claimant, in his appeal, suggests that the "best method to ensure the orderly administration of the designated doctor process is to require compliance with the Rules from all parties: Commission, Claimant and Carrier."

In Texas Workers' Compensation Commission Appeal No. 042669-s, decided December 2, 2004, a designated doctor was appointed to determine MMI and IR because the previously appointed designated doctor could not examine the injured worker within the required time frame. That case stands for the propositions that the application of the appointment time frame in Rule 130.5(d)(1) is applicable to a subsequent request for a second or subsequent designated doctor examination for MMI and/or IR, that the Commission had not abused its discretion in the appointment of a second designated doctor when the first doctor could not meet the time frame and that the burden of proof is on the party challenging the Commission order.

In this case the Commission appointed Dr. B as the designated doctor on December 8, 2003, but inadvertently the scheduled examination date was outside the

time frame mandated by Section 408.0041 and Rule 130.5(d)(1). On December 9, 2003, the Commission then appointed Dr. K as the designated doctor with an examination date of December 30, 2003, which was the 21st day after the date of the order and which met the mandated time frame of Section 408.0041 and Rule 103.5(d)(1). We note further that not only did Dr. K's scheduled examination meet the time frames of the statute and Rule 130.5(d)(1) but it also expedited the examination process which we perceive to be the purpose of Section 408.0041 and Rule 130.5(d)(1).

We are cognizant of the scheduling problems encountered by the Commission in obtaining designated doctors who meet the required time frames, particularly around holiday seasons. However, there is no evidence that Dr. K was appointed for this reason or in fact that there was any other reason for the appointment other than an administrative oversight. Nonetheless, Dr. B's appointment was deficient on its face as the scheduled examination date was more than 21 days after the appointing order. The subsequent appointment of Dr. K inadvertently corrected the deficiency in Dr. B's appointment. Given that we have the appointment of two designated doctors, one of which is within the mandated time frame and one that is not, we hold that the proper designated doctor in this circumstance is Dr. K whose appointment and scheduled examination date met the time requirements of Section 408.0041 and Rule 130.5(d)(1) while the scheduled examination of Dr. B did not. We see no good reason not to utilize Dr. K's report in determining MMI and IR.

We caution that our holding in this case is strictly limited to the facts. We expressly hold that just because a designated doctor's scheduled appointment date does not meet the time frame of Rule 130.5(d)(1) does not automatically invalidate that appointment.

MMI AND IR

As previously noted Dr. K certified MMI on December 30, 2003, with a 5% IR. In that we are holding that Dr. K's appointment met the requirements of Rule 130.5(d)(1) we hold that Dr. K's report has presumptive weight. The hearing officer commented that the "conflict over the appropriate DRE Category amounts to no more than a professional disagreement and reflects the claimant's presentation at the time of the examination."

Sections 408.122(c) and 408.125(c) provide that the designated doctor's MMI and IR report has presumptive weight and the Commission shall base its determinations of MMI and IR on that report unless the great weight of the other medical evidence is contrary to the report. Although there is conflicting medical evidence we note that the treating doctor also believed that the claimant should be assessed "DRE Category II for 5%."

We reverse the hearing officer's determination that Dr. B "was [the] validly appointed designated doctor" and render a new decision that Dr. K is the properly appointed designated doctor. In that we are reversing the hearing officer's decision regarding the designated doctor, we also reverse the hearing officer's decision that the

claimant's MMI date is January 5, 2004, with a 0% IR and render a new decision that the date of MMI is December 30, 2003, with a 5% IR as assessed by Dr. K whose report is not contrary to the great weight of the other medical evidence.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBIN MOUNTAIN
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 300
IRVING, TEXAS 75063.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge